Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. ~~79~~ -915

ANA MARIA DOMINGUEZ,

Petitioner,

-v.-

ABRAHAM D. BEAME, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE CASE

With respect to the facts of this case, respondents would respectfully refer the Court to the opinion of the Court of Appeals (A-1 to A-22), as well as to the opinion of

the District Court (A-23 to A-35). In particular, we would refer the Court to A-6 and A-24 to A-25, where the evidence relative to the events preceding petitioner's arrest is summarized, and to A-25, where the District Court specifically held that the arresting officers' testimony was more credible than petitioner's.

Notably, petitioner's Statement of the Case is silent as to these matters, instead treating this case as if it involved only an abstract Police Department policy with respect to making disorderly conduct arrests following observation of the briefest on-street conversations. In fact, however, in this case, the officers' testimony, credited by the District Court, was that petitioner had been the subject of a complaint to them (of "hassling") and thereafter they saw her engage two other pedestrians and someone in

a car in conversation (A-24 to A-25). Thus, whatever the general policy here complained of, in this case, the officers had more to act on in arresting petitioner than that policy.

ARGUMENT

1. THE COURTS BELOW INCORRECTLY HELD THAT THERE WAS NO PROBABLE CAUSE FOR PETITIONER'S ARREST. SINCE THERE WAS PROBABLE CAUSE FOR THIS ARREST, THE ISSUES TENDERED BY PETITIONER NEED NOT BE REACHED.

Although both the District Court and the Court of Appeals rejected our argument in this regard, it is the respondents' position that there existed probable cause for petitioner's arrest, which, if we are correct, would obviate any need for this Court to reach the issues tendered by petitioner.

As we have noted, as found by the District Court, the officers arrested petitioner only after a male pedestrian had complained of being "hassled" by her, and after the officers observed her stop two other men and converse with them and also converse with someone in a car. Under any fair view, whatever might be one's opinion of the Police Department's alleged policy of making disorderly conduct arrests of women merely observed "conversing on the street with male strangers" (Petition, p. 12), in this case we believe it is beyond reasonable question that the respondent officers had a basis for arresting the petitioner for violation of New York Penal Law §240.20 (5).*

*Penal Law §240.20 (5) provides:

> "A person is guilty of disorderly conduct when, with intent to cause

(footnote cont'd. on next page)

In the District Court's opinion, the Court rejected our argument that such conduct was sufficient to furnish probable cause to arrest, based upon New York Court of Appeals decisions construing a prior New York "disorderly conduct" statute (People v. Nixon, 248 N.Y. 182 [1928]; People v. Carcel, 3 N.Y. 2d 327 [1957]), as well as a 1967 practice commentary to the then newly enacted, revised New York Penal Law (A-27 to A-28). But the District Court failed to note that, unlike the prior statute, the disorderly conduct statute under which petitioner was arrested does

* (footnote cont'd. from previous page)

> public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
>
> * * *
>
> 5. He obstructs vehicular or pedestrian traffic...."

not require "intent to provoke a breach of the peace" or conduct "wherby a breach of the peace may be occasioned" (New York Penal Law of 1909, §722; added initially by Laws of N.Y. of 1923, ch. 642, §1), but rather requires merely an "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" (Penal Law §240.20).

Moreover, although the Court of Appeals in this case held that "there was not in fact probable cause to arrest the [petitioner] on a charge of 'disorderly conduct'" (A-18), as that court itself noted, this statute had not previously been construed under circumstances similar to those here (id.). And, given this fact, and the language of the present New York disorderly conduct statute, as well as what had been reported to the

officers and they themselves had observed, we submit that the officers, under this Court's decisions dealing with warrantless arrests, had probable cause to arrest the petitioner. See, generally United States v. Watson, 423 U.S. 411, 416-422 (1976).

Here, certainly, the officers, quite independent of any alleged City policy, had a reasonable basis for believing that petitioner was engaging in disorderly conduct in their presence, and their having such probable cause to arrest petitioner should put an end to this case, whatever the lawfulness of the City's alleged general policy.

2. THE COURT OF APPEALS PROPERLY HELD THAT THE RESPONDENTS' POLICY CANNOT SERVE AS A BASIS FOR IMPOSING LIABILITY UPON A MUNICIPALITY UNDER §1983.

Quite apart from the question of whether municipalities should enjoy a qualified immunity based on good faith under §1983, compare Owen v. City of Independence, sub judice in this Court, No. 79-1779, we believe the Court of Appeals' initial focus in the instant case on the challenged policy was entirely correct under this Court's decision in Monell v. Dept. of Social Services, 436 U.S. 658 (1978). As found by the District Court (A-34), and the Court of Appeals accepted this finding (A-12 to A-13), the Police Department's policy was clear that disorderly conduct arrests were to be made only when the officers had observed conduct which they in good faith believed consti-

tuted an offense. This was the Police Department's policy, and as a municipal policy it seems unexceptionable.

In the case at bar, all that petitioner has shown as to policy adopted (or ratified) at this level of government is simply a policy of approving enforcement of the laws. It cannot be said in this case that the City "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" (Monell, supra, 436 U.S., at 694), adopted any policy of making improper sweep arrests or arrests on anything less than probable cause.

3. ASSUMING ARGUENDO THAT PETITIONER WAS ARRESTED PURSUANT TO AN UNCONSTITUTIONAL MUNICIPAL POLICY REGARDING ARRESTS FOR DISORDERLY CONDUCT, IT SHOULD BE HELD THAT ALL DEFENDANTS ENJOY THE DEFENSE OF GOOD FAITH.

Although this Court expressly left open in Monell the question of whether municipalities should enjoy the protection of the defense of good faith in suits under §1983, and this question is now before this Court in Owen v. City of Independence, we are at a loss to understand how on any jurisprudentially sound basis, it could reasonably be proposed that liability for damages should be imposed on the City of New York on the facts of the case at bar. Nor do we see how the legislative history of what is now §1983, discussed at length in Monell, can support an inference of Congressional

intent to impose liability under such circumstances.

Indeed, the irony of what petitioner here argues for, in seeking to have the City cast in damages for its clearly good faith effort to enforce the laws, is that what was of concern to Congress in its debates on the Sherman amendment was the failure of local authorities to enforce the laws and keep the peace. See, e.g., 436 U.S., at 667-669, 673-675. Thus, quite apart from considerations of federalism, as well as considerations of fairness to municipal taxpayers, who, we believe, should not through their local governments be forced to pay damage awards where the local government was not on fair notice that its acts or policies were violative of clearly established constitutional rights, compare Wood v.

Strickland, 420 U.S. 308, 322 (1975), it seems most doubtful that the Congress which adopted §1983, which was apparently anxious to see vigorous enforcement of the laws on an equal basis, would have intended that local governments should act at their peril in seeking to enforce the laws, including laws designed to protect civil rights. Such a view of §1983 can only chill law enforcement efforts, and this is simply not consistent with the temper of the Congress which enacted this statute.

In addition, when one also takes into consideration that Congress's apparent concern with and respect for the proper role of the states in our federal system, see Monell, supra, 436 U.S., at 676-679, further support is lent to the argument that it is unlikely that Congress intended

either in this fashion to chill local action or to impose such onerous liability.

CONCLUSION

The petition for certiorari should be denied.

April 8, 1980

Respectfully submitted,

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